ANG LAY SIM

v.

CHOO LAY POH

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R2-12-334-2002]
3 DECEMBER 2002

PARTNERSHIP: *Debt - Liability - Dishonoured cheques - Partner signing blank cheques and withdrawing from partnership prior to cheques being dishonoured - Whether still liable for debts - Whether an apparent member of partnership - Partnership Act 1961 ss. 11, 38(1), (2) - Bills of Exchange Act 1949 s. 50(2)*

WORDS & PHRASES: *'Apparent member' - Partnership Act 1961, s. 38 - Meaning of*

The appellant and two other defendants in the action below were partners of a firm known as Music Stationer Enterprise. Between 28 November 2000 and 13 January 2001, Music Stationer Enterprise had issued 17 post-dated cheques to the respondent. The appellant was a co-signatory of all the cheques in question, albeit that she had apparently signed the same in blank. The cheques were dishonoured and the respondent, having filed the action below, successfully applied for summary judgment thereof. The appellant appealed and argued that summary judgment ought not to have been granted, and that she was not liable for the debts, as: (i) the debts only accrued after she had left Music Stationer Enterprise; and (ii) the respondent had not given any notice of dishonour in respect of the cheques.

Held (dismissing the appeal):

[1] The appellant was at the very least an apparent member of Music Stationer Enterprise at the material time. The phrase 'apparent member' in s. 38 of the Partnership Act 1961 must be construed in its ordinary English Language meaning. 'Apparent' in this context must be taken to mean 'appearing (but not necessarily) real or true'. (p 11 e-f)

[2] The appellant failed to show that she has given any form of notice to the respondent of the dissolution of the partnership, whether in the form of special communication to the respondent or by Gazette as prescribed by s. 38(2) of the Partnership Act 1961. A mere notice to the Registry

of Businesses is insufficient. Hence, the appellant must continue to be treated as a partner of Music Stationer Enterprise and was liable for its debts by reason of s. 11 of the Partnership Act (being a co-signatory of the cheques). (p 11 h)

[3] The fact that the cheques were dated subsequent to the appellant's retirement should be of no consequence as no notice was given of such retirement. In any event, the appellant admitted to pre-signing the cheques in blank and she could not now say that the debts were incurred only after dissolution. In other words, the appellant could not approbate and reprobate. (p 11 g-h)

[4] While the appellant was quick to submit that the words 'refer to drawer' did not necessarily mean that there were insufficient funds to meet the cheques, the appellant had not provided any alternative explanation as to why these cheques were so marked. The appellant had thus failed to raise any issue that meritted a full trial. (p 12 g-h)

[4a] The appellant herself and Music Stationer Enterprise should be able to answer the question as to whether there were sufficient funds in Music Stationer Enterprise's bank account to meet payment on the cheques. The fact the appellant has omitted to provide an alternative explanation as to why the cheques marked 'refer to drawer' were dishonoured clearly indicated that they were indeed dishonoured because there were insufficient funds in the said account. The fact that the account was thereafter closed was further evidence of this. The appellant's purported defence was thus nothing more than a sham. (p 13 b-d)

Case(s) referred to:

Chen Heng Pin & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA ***(refd)***

Hong Kong Printing Co Sdn Bhd v. Lau Kooi Seng [1986] 1 CLJ 211; [1986] CLJ (Rep) 368 HC ***(refd)***

Re Chop Yew Seng, ex p Sri Sundari Palyakat Co [1958] 24 MLJ 239 ***(refd)***

Re Siew Inn Steamship Company, ex p Ho Hong Bank Limited [1934] MLJ 180 ***(refd)***

Tan Sin Moh v. Lebel Ltd [1988] 2 MLJ 51 ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, s. 50(2)

Partnership Act 1961, ss. 11, 38(1), (2)

Other source(s) referred to:

Webster's New World Dictionary, 3rd College edn, p 65

Lindley & Banks on Partnership, 1995, 17th edn. 1995, p 368

For the defendant - WK Wong; M/s Muthu & Partners
For the plaintiff - TA Chan; M/s. Lopez & Woon-Choon

Reported by WA Sharif

JUDGMENT

Faiza Tamby Chik J:

This appeal arises from a decision of the learned sessions court judge granting an application for summary judgment made by the plaintiff against the 2nd defendant. The brief facts of this case are as follows. The respondent is the sole proprietor of Wai Yee Enterprise. The appellant and the remaining two defendants in the action from which this appeal arose were at all material times the partners of a firm known as Music Stationer Enterprise (see exh. CLP6 at Record of Appeal (RR) 97-98). Exh. CLP6 is a copy of the results of a search conducted at the registry of businesses. The search report is dated 5 December 2000. It lists all the defendants, including the appellant herein as partners of the firm. In fact, the appellant and the 3rd defendant are siblings (see admission at RR 46 para. 13). In a previous affidavit affirmed by the appellant in this action, the appellant referred to herself as a "partner" of Music Stationer Enterprise. She subsequently denied that she was a partner and instead now claims she is merely an employee (see RR10 para. 10). Her *bona fides* is therefore suspect. Music Stationer Enterprise had issued the 17 post-dated cheques listed at para. 3 of the statement of claim (RR5) which were dated between 28 November 2000 and 13 Janaury 2001. Copies of the said cheques are at CLP1 at RR 50-59. The appellant was the co-signatory of all of the cheques in question. She admits to having signed the cheques in blank and that the cheques were indeed post-dated (see RR 30-31 para. 12). Cheques No. 1-14 and cheque No. 17 were presented for payment and dishonoured (see para. 6 of RR 24). Evidence of dishonour is contained at CLP2 and CLP3. These are bank statements of the respondent which show the reasons why the various cheques were dishonoured. Essentially, there were 3 reasons for dishonour:

(i) "Refer to drawer": Cheques 1, 4, 6, 7,8 ,10, 11,12,13 & 14;

(ii) "Payment stopped": Cheques No. 2, 3 (twice), 5 and 9; and

(iii) "Accounts closed": Cheque No. 17 (12 December 2000).

Cheque No. 15 and 16 were not presented for payment as these were dated after the date of closure of the account of Music Stationer Enterprise. In this case the respondent always knew that the appellant to be a partner of Music

Stationer Enterprise. This was later confirmed by a search done at the registry of businesses on 5 December 2000. The respondent never received notice in any form of the alleged withdrawal of the appellant from Music Stationer Enterprise and had no knowledge of the agreement between the appellant and the 3rd defendant (see RR p. 40, para. 11).

It is the contention of the appellant that firstly, he was not liable for the dishonoured cheques since the debts accrued after he had withdrawn from the partnership, and secondly he was not liable as the respondent has failed to give sufficient notice of dishonour. It is noted that the appellant was at all material times a partner of Music Stationer Enterprise. It is not disputed by the appellant that she was a partner of Music Stationer Enterprise prior to 18 Janaury 2000. However, the appellant stated that she was not liable for the dishonoured cheques as she had allegedly left the partnership on 18 January 2000, prior to the issuance of the cheques. In this regard it is pertinent to draw our attention to s. 38(1) and (2) of the Partnership Act 1961 which read as follows:

> 38. Rights of persons dealing with firm against apparent members of firm
>
> (1) Where a person deals after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.
>
> (2) An advertisement in the Federal Gazette as to a firm whose principal place of business is in West Malaysia ... shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

In *Hong Kong Printing Co Sdn Bhd v. Lau Kooi Seng* [1986] 1 CLJ 211; [1986] CLJ (Rep) 368 HC the court held that a person whose name continues to be listed in the particulars kept by the registry of businesses may be treated as an apparent partner. Accordingly, the plaintiff was entitled to rely on the particulars lodged with the registry of businesses since the plaintiff had no knowledge of the dissolution of the firm. The defendant was held liable for debts incurred after his purported resignation from the firm since no notice was given of that fact to the plaintiff.

In *Re Chop Yew Seng, ex parte Sri Sundari Palyakat Co* [1958] 24 MLJ 239 (a pre-Partnership Act case) Rigby J held that where a known partner retires or a partnership is dissolved, notice of that fact must be given to the world at large by advertisement (which the Partnership Act now prescribes is to be by way of Gazette) to old customers by some special communication; and in considering whether notice of retirement or dissolution is sufficient, a

distinction must be made according as to whether the person sought to be effected by notice was or was not a customer of the old firm. A mere notice to the registry of business names is not sufficient.

In *Tan Sin Moh v. Lebel Ltd* [1988] 2 MLJ 51 and in *Re Siew Inn Steamship Company, ex parte Ho Hong Bank Limited* [1934] MLJ 180, it was held that existing customers of a partnership must be given special notice of dissolution. Therefore it is plain that the effect of s. 38 of the Partnership Act, 1961 as interpreted by the aforementioned cases is as follows:

(a) Persons who had dealing with a partnership prior to its dissolution or change in constitution are entitled to special notice of such dissolution or change in constitution;

(b) Persons who have not had dealings prior to such dissolution or change in constitution are entitled to treat all apparent members as partners of the firm until they have had sufficient notice of the dissolution or change in constitution;

(c) In the context of persons who have not had dealings prior to such dissolution or change in constitution, a gazetting of the dissolution or change in constitution is sufficient notice: see s. 38(2) of the Partnership Act.

In this case I think the appellant was at the very least an apparent member of Music Stationer Enterprise. The phrase "apparent member" in s. 38 of the Partnership Act must be construed in its ordinary English language meaning. "Apparent" in this context must be taken to mean "appearing (but not necessarily) real or true", see *Webster's New World Dictionary*, 3rd College Edn., p. 65. The appellant is an apparent member of Music Stationer Enterprise by reason of the facts that at all material times they were partners of the said firm. The fact that the cheques were dated subsequent to the appellant's retirement should be of no consequence as no notice was given of such retirement. In any event, it must be pointed out that the appellant admitted to pre-signing the cheques in blank and she cannot now say that the debts were incurred only after dissolution. It is a cardinal rule of equity that a person cannot approbate and reprobate ie, the appellant cannot be allowed to take the benefit of pre-signing the cheques in blank only later to disclaim the liabilities imposed by the same instrument. The appellant has failed to show that she has given any form of notice to the respondent of the dissolution whether in the form of special communication to the respondent or by Gazette as prescribed by s. 38(2) of the Partnership Act. A mere notice to the registry of businesses is insufficient. In the premises, the appellant must continue to be treated as a partner of Music Stationer Enterprise and is liable for its debts by reason of

s. 11 of the Partnership Act which states that "every partner in a firm is liable jointly with other partners for all debts and obligations of the firm incurred while he is a partner". It is to be noted that the appellant was a co-signatory of the cheque. In *Swan v. Steel* [1806] 7 East 210 (also referred to in *Lindley & Banks on Partnership* (17th edn 1995) at p. 368, Lord Lindley stated:

> A bill drawn, indorsed or accepted in the name of the firm is considered as bearing the names of all the persons who actually or ostensibly compose the firm at the time its name is put to the bill; and consequently all those persons, including as well dormant partners, and quasi-partners, may be sued on upon the bill.

I am of the opinion that the above principle must necessarily apply to "apparent" members of a partnership within the meaning of s. 38 of the Partnership Act, 1961.

As stated earlier there were 3 reasons for the dishonour of the cheques which form the subject matter of this action:

(a) Cheques dishonoured with the marking "Refer to drawer": Cheques No. 1, 4, 6, 7, 8, 10, 12, 13 and 14;

(b) Cheques dishonoured which were marked "Payment stopped": Cheques No. 2, 3 (twice), 5 and 9; and

(c) Cheques dishonoured by reason of the account having been closed: Cheque No. 17 (12 December 2000).

Under s. 50(2) of the Bills of Exchange Act 1949, notice of dishonour is dispensed with *inter alia* by waiver express or implied - see s. 50(2)(b), and where the drawer has countermanded payment - see s. 50(2)(c)(v). Notice of dishonour is dispensed by s. 50(2)(c)(v) of the Bills of Exchange Act in respect of the cheque which was marked "payment stopped" which clearly indicates that Music Stationer Enterprise had countermanded its payment. In the case of *Md Amirudin v. Varatharajan* [1968] 2 MLJ 83, it was held that the words "refer to drawer" indicated an absence of effects, and as such notice of dishonour was dispensed with by express or implied waiver. It is seen that while the appellant was quick to submit that the words "Refer to Drawer" did not necessarily mean that there were insufficient funds to meet the cheques the appellant had failed to provide any alternative explanation as to why these cheques were so marked. The appellant had thus failed to raise

any issue which merits a full trial. I think that when a cheque is dishonoured by reason of the particular account having been closed, the natural inference (in the absence of any alternative explanation by the account holder) is that there is an absence of effects and as such the requirement for notice of dishonour must be taken to have been waived whether expressly or by implication. The appellant has conceded that this is the case here. I am of the opinion that the triable issue identified by the appellant in this case is in actual fact a non-issue. The appellant herself and Music Stationer Enterprise should be able to answer the question as to whether there were sufficient funds in Music Stationer Enterprise's bank account to meet payment on the cheques. The fact that the appellant has omitted to provide an alternative explanation as to why the cheques marked "Refer to Drawer" were dishonoured clearly indicates that they were indeed dishonoured because there were insufficient funds in the said account. The fact that the account was closed thereafter is further evidence of this. I think the appellant's purported defence to this action is nothing more than a sham. This is clear from the appellant's contention that she is liable only for the cheques dishonoured by reason of countermand or the closure of the account amounting to RM48,597. In any event, this contention in itself constitutes an admission of liability.

In *Chen Heng Pin & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690, the Court of Appeal held that when an application is made for summary judgment on the basis that there is no defence, the defendant must show cause why leave to defend must be given. The defendant must provide answers on oath which constitute evidence that they have a defence which is fit to be tried. Denials do not constitute evidence. They are merely challenges to the other side to show proof. Applying this principle to the present facts it is clear that the appellant has not shown cause why this matter should go trial. Accordingly, the appeal is dismissed with costs.